EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
HALO WIRELESS, INC.,	§	Case No. 11-42464
	§	(Chapter 11)
Debtor.	§	

ORDER DENYING MOTIONS FOR STAY PENDING APPEAL

Now before the Court are three motions to stay pending appeal (collectively, the "Stay Motions") filed by the debtor on October 28, 2011. Each of the Stay Motions consists of a request for a stay pending the resolution of the debtor's appeals from the Court's determination that regulatory proceedings currently pending before various state utility commissions are excepted from the automatic stay in bankruptcy pursuant to 11 U.S.C. § 362(b)(4). Because the Stay Motions are substantially identical and the appeals will essentially present the same issues for consideration, it is appropriate for this Court to consider the Stay Motions on a consolidated basis.

The Court has jurisdiction to consider the Stay Motions pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). The Court has the authority to enter a final order regarding these contested matters since they constitute core proceedings as contemplated by 28 U.S.C. §157(b)(2)(A) and (O). This Court's jurisdiction is also reflected in the provisions of Federal Rule of Bankruptcy Procedure 8005.[2]

Under Federal Rule of Bankruptcy Procedure 8005, a court's "decision to grant or

[2] Federal Rule of Bankruptcy Procedure 8005 provides, in pertinent part, that:

> [A] motion for a stay of the judgment, order, or decree of a bankruptcy judge...or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court...reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the [Bankruptcy] Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

deny a stay pending appeal rests in the discretion of that court. However, the exercise of that discretion is not unbridled." *In re First S. Savs. Ass'n,* 820 F.2d 700, 709 (5th Cir. 1987). Rather, this Court "must exercise its discretion in light of what this court has recognized as the four criteria for a stay pending appeal." *Id.* The four criteria are: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest. *Arnold v. Garlock, Inc.,* 278 F.3d 426, 439-42 (5th Cir. 2001); *In re First S. Savs. Ass'n,* 820 F.2d at 709. Each criterion must be met, and "'the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.'" *Arnold,* 278 F.3d at 439 (quoting *In re First S. Savs. Ass'n,* 820 F.2d at 704).

The Court, having reviewed the debtor's Stay Motions, considered the legal arguments presented by the parties at the hearing on November 1, 2011, and reviewed the record in this case, finds and concludes that the debtor has not made a showing of irreparable injury absent a stay. The harms alleged by the debtor – *i.e.*, the cost of the proceeding before the state utility commissions and the potential for differing results amongst the commissions – are "part and parcel of cooperative federalism." *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010). On the other hand, the granting of a stay would substantially harm other parties by interfering with the state utility commissions' ability to regulate public utilities and by requiring creditors to continue providing services to the debtor in the future. Moreover, the granting of a stay would not comport with the public interest, including the policies underlying the concept of cooperative federalism and the interest of the public utility commissions, as the experts on the laws and rules governing the telecommunications/telephone industry, in regulating

the industry for the benefit of the users of the services.

With respect to the final element, the Court recognizes that it is difficult for the debtor to establish (in this Court) a substantial likelihood of success on the merits when this Court issued the underlying ruling. This case involves a serious legal question and, in light of the absence of controlling Fifth Circuit authority, there is a risk that this Court's decision could be reversed. The Court nonetheless finds that the debtor failed to sustain its burden to establish a substantial likelihood of success on the merits. Even if the debtor could be said to have presented a substantial case on the merits, the balance of the equities does not weigh heavily in favor of granting the stay when the Court's prior determination allows the debtor to raise its legal issues and arguments before the state utility commissions. Accordingly,

IT IS ORDERED, ADJUDGED and DECREED that the Stay Motions [Docket Nos. 176, 177 and 178] must be, and hereby is, **DENIED.**

Signed on 11/1/2011

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE: HALO WIRELESS, INC.	§ §	
HALO WIRELESS, INC.	§	Case No. 4:11-mc-55
v.	§	
SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T Arkansas, et al.	§	

ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL

Before the Court is Movant's Emergency Motion for Stay Pending Appeal of AT&T Order (Doc. No. 1). Upon order of the Court, Respondants filed an expedited response on Tuesday, November 29, 2011. Having considered the motion, the response, and the applicable law, the Court DENIES the motion. In view of this ruling, the hearing set for Thursday, December 1, 2011 is CANCELLED.

I. BACKGROUND

The underlying issue in this case involves technical questions arising out of the wireless telephone industry. Movant Halo Communications, Inc. and more than fifty of its competitors dispute the classification applicable to Halo and the services it provides. These classifications impact whether Halo is properly operating under its federally issued license and also what amount Halo must pay for access to the wireless network.

The underlying dispute involves multiple proceedings, including twenty state regulatory actions brought by Halo's competitors (respondents in this and the related appeals), a civil case pending before this Court (*Halo Wireless, Inc. v. Livingston Tel. Co.*, No. 4:11-cv-359), and a bankruptcy proceeding in the Eastern District of Texas, from which this appeal is taken. The issues at the heart of this appeal address questions of the interplay between these various proceedings and the authority and jurisdiction of the

federal and states entities involved.

Upon Halo's filing for bankruptcy protection on August 8, 2011, an automatic bankruptcy stay was imposed in the other proceedings listed above. But the bankruptcy court recently lifted the automatic stay as to the state regulatory actions, which allows those twenty actions to proceed.[1] Recognizing the lack of controlling precedent for its decision to lift the automatic stay, the bankruptcy court certified its decision for immediate appeal to the Fifth Circuit. Finally, the bankruptcy court denied Halo's motion to stay its order pending appeal. It is the last of these orders—the denial of the stay pending appeal—that is now under review by this Court.

II. LEGAL STANDARD

This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 158(a). The decision whether the grant a stay pending appeal is left to the sound discretion of the Court whose order is being appealed, in this case, the bankruptcy court. *Prudential Mortg. Capital Co., L.L.C. v. Faidi*, Nos. 10–20134,10–20423, 2011WL2533828, at *4 (5th Cir. Jun. 24, 2011) (per curiam). This Court reviews the bankruptcy court's decision for an abuse of discretion. *Id.; see also Webb v. Reserve Life Ins. Co. (In re Webb)*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (stating that when reviewing the case, the "district court functions as an appellate court and applies the same standard of review generally applied in federal appellate courts.").

Under the abuse of discretion standard, the district court must accept the bankruptcy court's findings of fact unless clearly erroneous and examine *de novo* the conclusions of law. *See Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 517 (5th Cir. 2004); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d

[1]The bankruptcy court limited the reach of the state regulatory bodies, noting that the order does not allow "liquidation of the amount of any claim against the Debtor" or "any action which affects the debtor-creditor relationship between the [Halo] and any creditor or potential creditor."

1303, 1307–08 (5th Cir. 1985); Fed. R. of Bank. P. 8013. Under the clearly erroneous standard, the court will only reverse if, after reviewing all of the evidence in the record, the court is "left with the definite and firm conviction that a mistake has been made." *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 565 (5th Cir. 1995) (quoting *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992)).

III. ANALYSIS

The Court has fully considered the bankruptcy court's order denying stay pending appeal. The bankruptcy court properly addressed and weighed each of the four relevant factors: (1) likelihood of success on the merits, (2) showing of irreparable injury if the stay is not granted, (3) whether the stay would substantially harm the other parties, and (4) whether the stay would serve the public interest. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439–42 (5th Cir. 2001). For the reasons stated below, the Court finds that the bankruptcy court did not abuse its discretion.

The bankruptcy court made several factual findings in considering Halo's motion to stay pending appeal. First, the bankruptcy court found that Halo would not suffer irreparable damage in absence of the stay. The bankruptcy court also found the requested stay would substantially harm the other parties and would not serve the public interest. Specifically, the bankruptcy court noted that a stay would demand the other parties to continue providing services to Halo, the debtor in the bankruptcy proceedings, and also would bind the hands of the state public utility commission, which are charged with regulating the telecommunications industry. Halo has not demonstrated that the bankruptcy court's factual findings are clearly erroneous, thus the Court will not disturb them on appeal.

Finally the bankruptcy court determined that Halo did not demonstrate a substantial likelihood of success on the merits. Halo's motion discusses in depth its potential for success before the Fifth Circuit. This Court recognizes—as did the bankruptcy court—that no Fifth Circuit precedent exists for the bankruptcy court's underlying decision. Halo suggests that this unresolved legal question eliminates the

need to seriously weigh the remaining factors. But the Fifth Circuit has been clear that all the factors must be considered. *See, e.g.*, *Ruiz v. Estelle*, 666 F.2d 854, 856–57 (5th Cir. 1982). Based on the balance of all four relevant factors, any potential for Halo's success on the merits (due to the unresolved question of law) is significantly outweighed by the other three factors.

IV. CONCLUSION

For the reasons stated above, the Court denies Movant's Emergency Motion for Stay Pending Appeal of AT&T Order (Doc. No. 1). It is further ordered that the hearing set for Thursday, December 1, 2011 is CANCELLED.

It is SO ORDERED.

SIGNED this 30th day of November, 2011.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-90050

In re: HALO WIRELESS, INCORPORATED,

Debtor

HALO WIRELESS, INCORPORATED,

Petitioner

v.

ALENCO COMMUNICATIONS INCORPORATED; ALMA COMMUNICATIONS COMPANY; BPS TELEPHONE COMPANY; BELLSOUTH TELECOMMUNICATIONS, L.L.C., doing business as AT&T Alabama; BIG BEND TELEPHONE COMPANY, INCORPORATED; BLUE RIDGE TELEPHONE COMPANY; BRAZORIA TELEPHONE COMPANY; CAMDEN TELEPHONE & TELEGRAPH COMPANY, INCORPORATED; CHARITON VALLEY TELECOM CORPORATION; CHARITON VALLEY TELEPHONE CORPORATEION; CHOCTAW TELEPHONE COMPANY; CITIZENS TELEPHONE COMPANY OF HIGGINSVILLE, MISSOURI; CONCORD TELEPHONE EXCHANGE, INCORPORATED; CRAW-KAN TELEPHONE COOPERATIVE, INCORPORATED; EASTEX TELEPHONE COOPERATIVE, INCORPORATED; ELECTRA TELEPHONE COMPANY, INCORPORATED; ELLINGTON TELEPHONE COMPANY; FARBER TELEPHONE COMPANY; FIDELITY COMMUNICATION SERVICES I, INCORPORATED; FIDELITY COMMUNICATION SERVICES II, INCORPORATED; FIDELITY TELEPHONE COMPANY; FIVE AREA TELEPHONE COOPERATIVE, INCORPORATED; GANADO TELEPHONE COMPANY; GOODMAN TELEPHONE COMPANY; GRANBY TELEPHONE COMPANY; GRAND RIVER MUTUAL TELEPHONE COMPANY; GREEN HILLS AREA CELLULAR; GREEN HILLS TELEPHONE CORPORATION; GUADALUPE VALLEY TELEPHONE COOPERATIVE, INCORPORATED; HILL COUNTRY TELEPHONE COOPERATIVE, INCORPORATED; HOLWAY TELEPHONE COMPANY; HUMPHREYS COUNTY

TELEPHONE COMPANY; IAMO TELEPHONE COMPANY; ILLINOIS BELL TELEPHONE COMPANY, doing business as AT&T Illinois; INDIANA BELL TELEPHONE COMPANY, INCORPORATED, doing business as AT&T Indiana.; INDUSTRY TELEPHONE COMPANY; K.L.M. TELEPHONE COMPANY; KINGDOM TELEPHONE COMPANY; LAKE LIVINGSTON TELEPHONE COMPANY, INCORPORATED; LATHROP TELEPHONE COMPANY; LE-RU TELEPHONE COMPANY; LIVINGSTON TELEPHONE COMPANY; MARK TWAIN COMMUNICATION COMPANY; MARK TWAIN RURAL TELEPHONE COMPANY; MCDONALD COUNTY TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY, doing business as AT&T Michigan; MID-MISSOURI TELEPHONE COMPANY; MID-PLAINS RURAL TELEPHONE COOPERATIVE, INCORPORATED; MILLER TELEPHONE COMPANY; MOKAN DIAL, INCORPORATED; NELSON-BALL GROUND TELEPHONE COMPANY; NEVADA BELL TELEPHONE COMPANY, doing business as AT&T Nevada; NEW FLORENCE TELEPHONE COMPANY; NEW LONDON TELEPHONE COMPANY; NORTEX COMMUNICATIONS COMPANY; NORTH TEXAS TELEPHONE COMPANY; NORTHEAST MISSOURI RURAL TELEPHONE COMPANY; ORCHARD FARM TELEPHONE COMPANY; OZARK TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY, doing business as AT&T California; PEACE VALLEY TELEPHONE COMPANY, INCORPORATED; PEOPLES TELEPHONE COOPERATIVE, INCORPORATED; QUINCY TELEPHONE COMPANY; RIVERA TELEPHONE COMPANY, INCORPORATED; ROCK PORT TELEPHONE COMPANY; SANTA ROSA TELEPHONE COOPERATIVE, INCORPORATED; SENECA TELEPHONE COMPANY; SOUTHWEST TEXAS TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE COMPANY, doing business as AT&T Arkansas; STEELVILLE TELEPHONE EXCHANGE, INCORPORATED; STOUTLAND TELEPHONE COMPANY; TATUM TELEPHONE COMPANY; TELLICO TELEPHONE COMPANY; TENNESSEE TELEPHONE COMPANY; THE MISSOURI PUBLIC SERVICE COMMISSION; THE OHIO BELL TELEPHONE COMPANY, doing business as AT&T Ohio; TOTELCOM COMMUNICATIONS, L.L.C.; VALLEY TELEPHONE COOPERATIVE INCORPORATED; WEST PLAINS TELECOMMUNICATIONS, INCORPORATED; WISCONSIN BELL TELEPHONE, INCORPORATED doing business as Wisconsin, AT&T KANSAS; AT&T MISSOURI; AT&T OKLAHOMA; AT&T TEXAS; AT&T FLORIDA; AT&T GEORGIA; AT&T KENTUCKY; AT&T LOUISIANA; AT&T MISSISSIPPI; AT&T NORTH CAROLINA; AT&T SOUTH CAROLINA; AT&T TENNESSEE,

Respondents

Motion for Leave to Appeal
Pursuant to 28 U.S.C. § 158(d)

Before KING, JOLLY, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion for leave to appeal under 28 U.S.C. § 158(d) is GRANTED.

IT IS FURTHER ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the motion to stay the bankruptcy proceedings pending appeal is DENIED.

EXHIBIT D

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **N/A**
Adversary Proceeding Number: **11-80162-dd**

ORDER GRANTING MOTION TO REMAND

The relief set forth on the following pages, for a total of 4 pages including this page, is hereby ORDERED.

FILED BY THE COURT
11/30/2011

Entered: 12/01/2011

David R. Duncan
US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Bellsouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina, Plaintiff, v. Halo Wireless, Inc., Defendant.	C/A No. 11-80162-dd **ORDER GRANTING MOTION TO REMAND**

This matter is before the Court on a Motion for Remand ("Motion") filed by Bellsouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina ("Plaintiff") on November 7, 2011. An Objection to Plaintiff's Motion was filed on November 21, 2011 by Halo Wireless, Inc. ("Defendant"), and a Reply was filed by Plaintiff on November 28, 2011. The Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In July 2011, Plaintiff filed state commission proceedings against Defendant in South Carolina and various other states, alleging violations of the parties' Interconnection Agreements ("ICAs"). Plaintiff claims primarily that Defendant disguised calls delivered by Plaintiff in order to avoid paying Plaintiff for such calls. On August 8, 2011, Defendant filed a chapter 11 bankruptcy petition in the Eastern District of Texas. Soon thereafter, Defendant attempted to remove the various state commission proceedings, including the proceeding pending in South Carolina, to federal courts in several different states. Judge Rhoades, the bankruptcy judge presiding over Defendant's chapter 11 case, found that the automatic stay did not apply to the state commission proceedings and ordered that such proceedings continue to a conclusion. On November 3, 2011, Judge Campbell, United States District Court Judge for the Middle District

of Tennessee, granted a Motion to Remand filed by Plaintiff in the Tennessee action, remanding the proceeding back to the Tennessee Regulatory Authority.

In this instant proceeding, Plaintiff argues that the proceeding should be remanded to the Public Service Commission of South Carolina ("South Carolina PSC") because the Court lacks jurisdiction over the proceeding. Plaintiff first argues that removal is substantively improper because the proceeding is an administrative proceeding and not a "civil action". Additionally, Plaintiff argues that the South Carolina PSC has exclusive jurisdiction to decide ICA disputes; only after the state commission makes a decision, Plaintiff argues, does the federal court have jurisdiction to review the PSC's decision. Plaintiff further argues that even if the federal court has jurisdiction, the South Carolina PSC has primary jurisdiction, and that this Court should defer to the PSC to decide this issue. Finally, Plaintiff argues that removal to this Court was not proper because the proceeding should have been removed to the District Court, and if the District Court sought to transfer the proceeding to the bankruptcy court after removal to the District Court, such transfer would be improper because the bankruptcy court has no jurisdiction over the issues raised. Defendant responds at length that this proceeding in fact meets the definition of a "civil action", that the South Carolina PSC lacks jurisdiction over the proceeding due to the federal law issues involved, and that therefore remand to the South Carolina PSC is inappropriate.

CONCLUSIONS OF LAW

This action, just like the action addressed in Judge Campbell's order, was removed to this Court prior to any adjudication by the South Carolina PSC. Thus, there is no decision or interpretation for this Court, or any other bankruptcy or district court, to review. *See Concord Telephone Exchange, Inc. v. Halo Wireless*, No. 3-11-0796 (M.D. Tenn. Nov. 3, 2011) ("Federal

district courts have jurisdiction to review certain types of decisions by state commissions, and the Telecommunications Act of 1996 . . . provides for judicial review of certain types of determinations by state commissions. . . . Here, however, as noted above, there is no state commission determination to review.") (citing *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475,480 (5th Cir. 2000); 47 U.S.C. § 252(e)(6)). The South Carolina PSC is primarily responsible for enacting and overseeing rates, regulations, terms, and conditions relating to telecommunication service providers and their ICAs. *See* 47 U.S.C. § 252(e); S.C. Code § 58-9-10 et seq. As a result, the South Carolina PSC has jurisdiction over the claims presently before the Court, and it is in the best position, with expertise in such matters, to decide this dispute relating to the parties' ICA. *See id.* This Court agrees with the reasoning behind Judge Campbell's decision to remand the Tennessee action to the Tennessee Regulatory Authority, and finds the same should be done here. The remaining arguments presented by the parties do not have to be addressed, as the Court has found that remand is appropriate for the reasons stated above. Plaintiff's Motion to Remand is granted. The case is remanded to the South Carolina Public Service Commission.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to Remand is granted. The case is remanded to the South Carolina Public Service Commission, where it may proceed to a conclusion.

AND IT IS SO ORDERED.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.	)
	) NO. 3-11-0795
v.	) JUDGE CAMPBELL
HALO WIRELESS, INC.	)

MEMORANDUM

Pending before the Court are Defendant's Motion to Transfer (Docket No. 6) and Plaintiff's Motion for Entry of an Order Remanding Proceeding to Tennessee Regulatory Authority (Docket No. 15). For the reasons stated herein, Defendant's Motion to Transfer is DENIED, and Plaintiff's Motion to Remand is GRANTED.

FACTS

This action was originally filed by Plaintiff before the Tennessee Regulatory Authority ("TRA"), alleging that Defendant materially breached its wireless interconnection agreement ("ICA") with Plaintiff. Plaintiff sought to terminate the ICA, based upon Defendant's breaches, and to recover certain monies allegedly owed by Defendant to Plaintiff. Docket No. 1-1. Plaintiff's Complaint alleges causes of action for breach of contract only. *Id.*

Following the filing of Plaintiff's Complaint in the TRA, Defendant filed a Suggestion of Bankruptcy, indicating that Defendant had filed a voluntary petition for relief under the federal Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Texas ("the Bankruptcy Court") and asserting that the automatic stay (11 U.S.C. § 362) prohibited any further action against Defendant in the instant proceeding. Docket No. 1-2.

Thereafter, Defendant removed the TRA action here, alleging that this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 1452. Docket No. 1. Defendant then filed an adversary proceeding in the Bankruptcy Court, naming Plaintiff as one of several defendants in that adversary proceeding. Docket No. 6-1, ¶ 5. Defendant has asked the Bankruptcy Court in the adversary proceeding for declaratory judgment as to all federal issues raised in various state commission proceedings filed against it, including this action. *Id.*

Defendant then moved to transfer this action to the Bankruptcy Court. Docket No. 6. Plaintiff opposes Defendant's Motion to Transfer and asks the Court to remand this action to the TRA for further administrative proceedings. Docket No. 15.

Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4),[1] so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. Docket No. 21-1. The Bankruptcy Court held that the automatic stay does apply to prevent parties from bringing or continuing actions for money judgments or efforts to liquidate the amount of the complainants' claims. *Id.*[2]

Defendant has appealed this ruling of the Bankruptcy Court and has moved to stay the actions pending appeal. Docket No. 24. Defendant has represented that it intends to request certification of this issue to the Fifth Circuit Court of Appeals. *Id.*

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[1] 11 U.S.C. § 362(b)(4) provides that a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit.

[2] The Bankruptcy Court did not rule that this action in this Court may proceed, yet neither party is arguing that the automatic stay should apply herein.

MOTION TO REMAND

This action is not an appeal from a state commission decision; rather, this action was removed prior to a determination by the TRA. The Court will address the Motion to Remand first, since granting the Motion to Remand would make the Motion to Transfer moot. Plaintiff argues that Defendant improperly removed this action to this Court.

Federal law provides that a party may remove any claim or cause of action in a civil action by a governmental unit to enforce such governmental unit's police or regulatory power to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under the Bankruptcy Code. 28 U.S.C. § 1452(a).[3] The Bankruptcy Code provides that the district courts have original but not exclusive jurisdiction of all civil proceedings arising in or related to bankruptcy cases. 28 U.S.C. § 1334(b).

Plaintiff argues that a claim for interpretation or enforcement of an IRA must be brought in the first instance in the state commission that approved the IRA in question. Docket No. 15. Plaintiff argues that the jurisdiction of this Court is limited to determining rights under ICAs after final ruling from the state commission. *Id.* Defendant, on the other hand, contends that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action"[4] and that the TRA does not have jurisdiction because the claims implicate federal questions. Defendant also asserts that

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[3] Section 1452 also provides that the Court to which such claim or causes of action is removed may remand such claim or cause of action on any equitable ground. 28 U.S.C. § 1452 (b).

[4] In the case of *In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. April 14, 2011), the court held that the debtor could not remove the action under 28 U.S.C. § 1452, finding that administrative proceedings are not "civil actions" and are therefore not removable. *Id.*

the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction. Docket No. 1.[5]

The Telecommunications Act of 1996 ("the Act") requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm'n of Texas,* 361 F.Supp.2d 634, 636 (W.D. Tex. 2005).[6] Federal district courts have jurisdiction to review interpretation and enforcement decisions of the state commissions. *Id.*; *Southwestern Bell* at p. 480; 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.

In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331.[7] *Id. at 778; see also*

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[5] Despite this assertion, Defendant asks the Court to transfer the action to the U.S. Bankruptcy Court for the Eastern District of Texas.

[6] "We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *Southwestern Bell*, 208 F.3d at 480. Most circuits have held that state commissions have the authority to interpret and enforce ICAs. *See Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 84, n.12 (1st Cir. 2010) and cases cited therein.

[7] Citing the Fourth Circuit Court of Appeals in *Verizon Maryland Inc. v. Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004), the *Central Telephone* court held that an ICA is a creation of federal law because it is a tool through which the Telecommunications Act is implemented and enforced. *Central Telephone*, 759 F.Supp.2d at 777.

Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1278-79 (11th Cir. 2003) (federal courts have jurisdiction under Section 1331 to hear challenges to state commission orders interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs., Inc.*, 323 F.3d 348, 353 (6th Cir. 2003) (federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland*, ICAs are federally mandated agreements and to the extent the ICA imposes a duty consistent with the Act, that duty is a federal requirement. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).

The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action.[8] Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what fora parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).

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[8] In *Southwestern Bell*, cited above, the court held that state commissions *could* hear disputes such as this one but did not reach the issue of whether state commissions were the exclusive jurisdiction for such cases. *Southwestern Bell*, 208 F.3d at 479-480.

The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core*, a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell*, 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).

On the other hand, in *Central Telephone*, the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone,* 759 F.Supp. 2d at 778 and 786.[9]

The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a "determination" by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell*, 540 F.Supp.2d at 919. As the *Core* court stated: "a state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved." *Core*, 493 F.3d at 343 (citing *BellSouth Telecommunications,* 317 F.3d at 1278, n.9).

For all these reasons, Plaintiff's Motion for Entry of an Order Remanding Proceeding to Tennessee Regulatory Authority is GRANTED, and this case is remanded to the TRA. The Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt

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[9] The *Central Telephone* court, characterizing the *Core* court's reasoning as "flawed," criticizes *Core* and those cases which follow its reasoning, arguing that the *Core* opinion went too far. *Central Telephone*, 759 F.3d at 783-84.

to obtain and/or enforce a money judgment. There is no indication in the record that the Bankruptcy Court wants this case (or others like it) to be transferred to it.

The parties' other arguments and Defendant's Motion to Transfer are moot.

IT IS SO ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BELLSOUTH TELECOMMUNICATIONS, LLC,

Plaintiff,

v. CASE NO. 4:11cv470-RH/WCS

HALO WIRELESS, INC.,

Defendant.

_____/

ORDER OF REMAND

This is a dispute between two telecommunications carriers concerning the terms of the parties' wireless interconnection agreement and the amount due from one to the other for terminating access charges. The plaintiff initiated the proceeding by filing a complaint in the Florida Public Service Commission. The defendant removed the proceeding to this court, asserting this is a "civil action" within the meaning of the federal bankruptcy removal statute, 28 U.S.C. § 1452. The defendant has moved to transfer the case to the United States Bankruptcy Court for the Eastern District of Texas, where the defendant has filed a Chapter 11

bankruptcy proceeding and an adversary proceeding. This order concludes that even if this is a civil action within the meaning of § 1452 and removal was therefore proper, equitable remand—as expressly authorized by § 1452—would be appropriate. This order grants the motion to remand and denies the motion to transfer.

I

BellSouth Communications, LLC d/b/a AT&T Florida ("AT&T") is a local exchange carrier. Halo Wireless, Inc., is a telecommunications carrier. AT&T and Halo entered into a wireless interconnection agreement. Under that agreement Halo sends wireless-originated traffic to AT&T, and Halo compensates the local exchange carrier by means of a "terminating access charge." AT&T asserts that Halo sent wireline-originated traffic in breach of that agreement and for the purpose of avoiding the payment of terminating access charges. AT&T also claims that Halo altered or deleted call information so that AT&T could not properly bill Halo for the termination of Halo's traffic. AT&T filed a complaint with the Florida Public Service Commission seeking monetary relief for past underpayments and the authority to terminate the interconnection agreement.

According to Halo, from May to August of this year, 100 different telecommunications companies located in ten different states brought at least 20 separate proceedings against Halo in the public utility commissions of those states,

all seeking resolution of claims similar to AT&T's. Faced with substantial litigation costs, on August 8, 2011, Halo filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas. Halo began removing the state commission proceedings to federal court. On September 1, 2011, Halo filed an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Texas, seeking a declaratory judgment as to the issues raised in the various state commission proceedings.

Halo removed the Florida Public Service Commission proceeding to this court, invoking the court's removal jurisdiction under 28 U.S.C. § 1452 and asserting subject matter jurisdiction under 28 U.S.C. § 1334. Halo has moved to transfer the proceeding to the Bankruptcy Court for the Eastern District of Texas. AT&T opposes transfer and has moved to remand.

II

Halo argues that I can and should transfer the case without deciding whether removal was proper. Although there is authority to the contrary, I assume I could indeed transfer the case without addressing removal. The better course here is not to do so.

III

Due to the limited jurisdiction of federal courts, removal statutes must be construed narrowly, and remand is generally favored. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). The sole basis for removal jurisdiction invoked by Halo is 28 U.S.C. § 1452(a), which provides in relevant part:

> A party may remove *any claim or cause of action in a civil action* other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a) (emphasis added). None of the exceptions apply. The removability of the proceeding AT&T initiated in the Florida Public Service Commission turns on whether it was a "civil action" within the meaning of the statute.

The issue is one of first impression in this circuit. In *BellSouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002), I held that a Florida Public Service Commission proceeding was improperly removed under the general removal statute, 28 U.S.C. § 1441, which allows removal of "any civil action brought in a State court." I held that the Florida Commission is not a state "court" as required by the statute. But the bankruptcy removal statute, § 1452, does not include that language; it allows removal of a "civil action" without

requiring that the action be pending in a "court." *See Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1572 (11th Cir. 1995) (holding that § 1452(a) is not limited to removal of claims from state courts).

To determine whether a proceeding is a "civil action," the focus is on the nature of the specific dispute. *See Vartec*, 185 F. Supp. 2d at 1282-83. In analyzing the requirements of a "civil action" and "State court" under the general removal statute, the Supreme Court, after holding that a county court was a "State court," went on to examine the proceeding to determine whether it was a "judicial controversy," as opposed to an administrative concern:

> Of course, the statutory designation of the action of a body as a judgment, or the phrasing of its finding and conclusion in the usual formula of a judicial order, is not conclusive of the character in which it is acting. When we find, however, that the proceeding before it has all the elements of a judicial controversy, to wit, adversary parties and an issue in which the claim of one of the parties against the other, capable of pecuniary estimation, is stated and answered in some form of pleading, and is to be determined, we must conclude that this constitutional court is functioning as such.

Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Sw. Ry., 257 U.S. 547, 557 (1922) (citation omitted); *see also Upshur Cnty. v. Rich*, 135 U.S. 467, 474 (1890) ("The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a [civil action]."); *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1267 (3d Cir. 1994).

This inter-carrier dispute has all the essential elements of a "judicial controversy." The dispute is a contract dispute between adversarial parties, and AT&T seeks damages as a result of Halo's alleged breach of the contract. The procedures involved also bear substantial similarities to a traditional civil action in a court. The action was initiated by AT&T's complaint filed in the Public Service Commission. Halo may file an answer to the complaint. The parties may conduct discovery. *See, e.g.,* Fla. Stat. § 364.183(2). Either party may file motions, including motions to dismiss and in some cases, motions for summary final order. *See* Fla. Admin. Code Ann. r. § 28-106.204. There are also differences between court procedures and the procedures in effect at the Florida Public Service Commission. For example, courts enter enforceable judgments; the Commission, in contrast, ordinarily must go to court to enforce its orders. *See, e.g.,* Fla. Stat. § 364.015. But such limitations do "not destroy the essential character of the proceeding as a judicial contest." *See In re Raymark Indus., Inc.*, 238 B.R. 295, 298 (Bankr. E.D. Pa. 1999). The case for holding this proceeding a "civil action" within the meaning of § 1452 is strong. *Cf. id.* (finding that a revival proceeding qualified as a civil action under § 1452(a) because the action was initiated by a complaint and the defendant could "file an answer or motion to dismiss, avail himself of discovery, file for summary judgment and ultimately have the matter resolved at an evidentiary hearing").

To be sure, two decisions point the other way. In *In re Adams Delivery Service, Inc.*, 24 B.R. 589 (B.A.P. 9th Cir. 1982), the Ninth Circuit Bankruptcy Appellate Panel held that a proceeding before the National Labor Relations Board could not be removed under the statutory predecessor to § 1452. The panel said the NLRB was not acting as a court and "the concept of a civil action is inseparable from a court proceeding." The panel thus concluded that the NLRB proceeding was not a "civil action" removable under the statute. *See id.* at 592. The court also noted that "the NLRB is not functionally a forum where private parties may present labor disputes. Rather the NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws." *Id.* This makes the NLRB different from the Florida Public Service Commission, which, at least as alleged in the complaint, has statutory authority to resolve private disputes of this nature.

Citing *Adams*, the United States Bankruptcy Court for the Eastern District of Kentucky recently held in an unpublished decision that removal of an administrative proceeding was improper under both § 1441 and § 1452(a) because the proceeding was not a civil action. *See In re T.S.P. Co.*, Bankr. No. 10-53637, 2011 WL 1431473, at *2-3 (Bankr. E.D. Ky. Apr. 14, 2011). Both *Adams* and *T.S.P.* substantially relied on a bankruptcy treatise for the proposition that an administrative proceeding is a not a civil action. *See 1-3 Collier on Bankruptcy* ¶

3.07[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) (citing *In re Adams Delivery Serv., Inc.,* 24 B.R. 589) ("Section 1452(a) does not permit removal of actions that are not 'civil actions.' Such things as criminal or administrative proceedings, for example, are not subject to removal."). Aside from citing the treatise, neither decision set out any significant analysis of why the proceeding at issue was not functionally a civil action.

Ultimately, though, whether § 1452 authorized the removal of this proceeding does not matter. The statute permits a court to remand a removed proceeding "on any equitable ground." 28 U.S.C. § 1452(b). In deciding whether to remand a proceeding on this basis, courts consider a variety of factors, including the preference for a state tribunal to resolve state-law questions, the expertise of a particular court or tribunal, and the effect of remand on the efficient administration of the bankruptcy estate. *See, e.g., In re Scanware, Inc.*, 411 B.R. at 897-98; *In re Royal*, 197 B.R. 341, 349 (Bankr. N.D. Ala. 1996); *see also Whitney Nat'l Bank v. Lakewood Investors*, No. 11-0179-WS-B, 2011 WL 3267160, at *6 (S.D. Ala. July 28, 2011) (citing cases and noting the various factors applied by courts under § 1452(b)).

The Florida Legislature and Congress have given the Florida Public Service Commission a role in resolving inter-carrier disputes on issues of this kind due to

the Commission's expertise. *See, e.g.,* Fla. Stat. § 364.16; 47 U.S.C. § 252. As I noted in *Vartec:*

> [T]he Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. § 364.07 (2001) [now Fla. Stat. § 364.16 (2011)], not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator.

Vartec, 185 F. Supp. 2d at 1283-84. That expertise is important in the present dispute, which involves the interpretation and enforcement of an interconnection agreement approved by the Florida Commission. Halo argues this dispute involves "exclusive" questions that only the Federal Communications Commission can address, but that seems unlikely, and would not defeat equitable remand in any event. *See id.* at 1285 ("The remedy for a state administrative agency's improper exercise of state-law-created jurisdiction over state-law disputes is not removal to federal court."). According to the interconnection agreement, Halo agreed that the applicable state public utility commission could resolve disputes. *See* ECF No. 4-1 at 22 of 25. If the Florida Commission lacks jurisdiction, Halo can presumably seek relief in the Federal Communications Commission. *See id.* And any order of the Florida Commission will be subject to challenge in federal court. *See BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317

F.3d 1270, 1277-79 (11th Cir. 2003). Halo's remedy—if it ultimately needs or is entitled to a remedy—is not removal of this proceeding to a federal court before the Commission even has a chance to consider AT&T's petition.

Further, remand will have minimal effect on the administration of Halo's bankruptcy estate. The United States Bankruptcy Court for the Eastern District of Texas has ruled that the pending proceedings against Halo in state public utility commissions—but not any attempts to collect any amount determined to be due—are exempt from the automatic stay. *See* Case No. 11-42464, Hr'g Tr. 107, 111-12, Oct. 7, 2011; ECF No. 14-1 at 109 & 113-14 of 117. The bankruptcy court's determination that this type of proceeding is exempt from the automatic stay and may go forward supports this court's decision to remand the proceeding.

On balance, I conclude that equitable remand is appropriate.

IV

For these reasons,

IT IS ORDERED:

AT&T's motion to remand, ECF No. 10, is GRANTED. Halo's motion to transfer, ECF No. 8, is DENIED as moot. This proceeding is remanded to the Florida Public Service Commission. The clerk must take all steps necessary to effect the remand.

SO ORDERED on December 9, 2011.

s/Robert L. Hinkle
United States District Judge

EXHIBIT G

MIME-Version:1.0
From:ecfMOW.notification@mow.uscourts.gov
To:cmecf_atynotifications@mow.uscourts.gov
Bcc:
--Case Participants: Toby L. Gerber (tgerber@fulbright.com), Mark A. Platt (mplatt@fulbright.com), Louis A Huber, III (dyoung@schleehuber.com, lhuber@schleehuber.com, lsprouse@schleehuber.com), Ann Ahrens Beck (ann.beck@att.com, felicia.finley@att.com, leo.bub@att.com, maryann.purcell@att.com, mr6217@att.com), Jennifer Heintz (cassie.melloway@psc.mo.gov, dawn.carafeno@psc.mo.gov, jennifer.heintz@psc.mo.gov, kristy.westrich@psc.mo.gov), Craig S. Johnson (cj@cjaslaw.com), Missouri Public Service Commission (jennifer.heintz@psc.mo.gov)
--Non Case Participants:
--No Notice Sent:

Message-Id:<3638180@mow.uscourts.gov>
Subject:Activity in Case 2:11-cv-04221-NKL Alma Communications Company et al v. Halo Wireless, Inc. et al Order on Motion to Remand
Content-Type: text/html

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U.S. District Court
Western District of Missouri

I HEREBY ATTEST AND CERTIFY ON 12/22/11 THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.
ANN THOMPSON
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
BY _____ DEPUTY

Notice of Electronic Filing

The following transaction was entered on 12/21/2011 at 9:46 AM CST and filed on 12/21/2011
Case Name: Alma Communications Company et al v. Halo Wireless, Inc. et al
Case Number: 2:11-cv-04221-NKL
Filer:
Document Number: 43(No document attached)

Docket Text:
ORDER entered by Judge Nanette Laughrey. Plaintiffs' motion to remand this case to the Missouri Public Services Commission ("the Commission") [Doc. # 7] is GRANTED for the reasons expressed in Orders granting remand in similar cases by the Middle District of Tennessee [Doc. # 38-1] and the District of South Carolina Bankruptcy Court [Doc. # 41-5]. The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiffs' claims until the Commission has rendered a decision for the Court to review. To the extent Defendant argues that Plaintiffs' claims should first be decided by the FCC, this argument is mooted by the FCC's recent rulemaking decision rejecting Defendant's position and reaffirming that the power to regulate these issues lies with state agencies. [Doc. # 41-

6]. Plaintiffs' request for costs and attorney fees for wrongful removal is DENIED. The propriety of removal was a complicated issue of law that Defendant appears to have pursued in good faith. This is a TEXT ONLY ENTRY. No document is attached.**(Kanies, Renea)**

2:11-cv-04221-NKL Notice has been electronically mailed to:

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Mark A. Platt mplatt@fulbright.com

Toby L. Gerber tgerber@fulbright.com

2:11-cv-04221-NKL It is the filer's responsibility for noticing the following parties by other means:

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T ALABAMA,	)	
Plaintiff,	)	
v.	)	CASE NO. 2:11-CV-758-WKW
	)	[WO]
HALO WIRELESS, INC.,	)	
Defendant.	)	

ORDER

Before the court are Defendant's Motion to Transfer (Doc. # 3) and Plaintiff's Motion to Remand (Doc. # 10). Plaintiff and Defendant are parties to a wireless interconnection agreement ("ICA"). Plaintiff filed a complaint with the Alabama Public Service Commission ("Alabama PSC"), claiming that Defendant materially breached the ICA by engaging in conduct to avoid certain charges. On September 14, 2011, Defendant removed the present action from the pending Alabama PSC proceeding, pursuant to 28 U.S.C. § 1452, which allows the removal of certain cases related to bankruptcy proceedings. (*See* Doc. # 1.) Defendant had filed a voluntary petition for relief in the United States Bankruptcy Court for the Eastern District of Texas on August 8, 2011. (Doc. # 1, at 2–3.)

On September 16, 2011, Defendant filed its Motion to Transfer. (Doc. # 3.) Defendant explained that as of August 8, 2011, "approximately 100 different telecommunications companies located in ten different states brought at least 20 separate proceedings against [Defendant] in the public utility commissions of those states[.]" (Doc. # 3, at 2.) Defendant sought to "transfer [these] action[s] to the United States Bankruptcy Court for the Eastern District of Texas . . . to become an adversary proceeding in [its] Bankruptcy case," and then consolidate the actions before that court. (Doc. # 3, at 3.)

After Defendant filed its Motion to Transfer, the Bankruptcy Court ruled that pending state public utility commission proceedings against Defendant are exempt from its automatic stay, but that attempts to collect any monetary judgments are not exempt. (Ex. 1 to Doc. # 28.) Defendant intends to appeal the Bankruptcy Court's ruling to the Fifth Circuit. (Doc. # 28, at 2.) Additionally, the FCC has issued a ruling specifically "disagree[ing] with Halo's contrary position." (Ex. F to Doc. 34.) Finally, at least four other federal courts have remanded similar proceedings involving Defendant to their respective state public utility commissions.[1]

[1] These courts include the United States District Courts for the Middle District of Tennessee, Northern District of Florida, and Western District of Missouri, and the United States Bankruptcy Court for the District of South Carolina.

The removing defendant has the burden of establishing the existence of federal jurisdiction. *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002). "[R]emoval statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

Defendant removed under 28 U.S.C. § 1452, which governs the removal of claims related to bankruptcy cases. The statute provides that

> [a] party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

§ 1452(a). However, § 1452(b), allows "[t]he court to which such claim or cause of action is removed [to] remand such claim or cause of action on any equitable ground."

There is no controlling authority in the Eleventh Circuit on this issue. In a recent action similar to this case, the United States District Court for the Northern District of Florida found that a proceeding removed from the Florida public utility commission was a "civil action" within the meaning of § 1452(a). *BellSouth Telecomms., LLC, v. Halo Wireless, Inc.*, No. 4:11cv470-RH/WCS, at 5–6 (N.D. Fla. Dec. 9, 2011). The court ultimately concluded that it had discretion to accept or remand the case. However, on balance, equity favored that the case be remanded to

the Florida Public Service Commission pursuant to § 1452(b). *Id.* at 10. The Northern District of Florida's reasoning is persuasive.

First, the Alabama PSC proceeding is a removable civil action within the meaning of § 1452(a). Alabama law provides a public utility commission scheme similar to that of Florida's. *See, e.g.*, Ala. Code § 37-1-84 (allowing a complaint to be filed before the Alabama PSC); Ala. Code § 37-1-86 (entitling parties to be heard through counsel and call witnesses at proceedings); Ala. Code § 37-1-92 (permitting parties to take witness depositions in accordance with the laws governing depositions in civil actions in the Alabama circuit courts); Ala. Pub. Serv. Comm'n Rule of Practice 16 (allowing parties to make requests for discovery). Proceedings before the Alabama PSC contain all the elements of a judicial controversy and are not simply administrative concerns. *See BellSouth Telecomms., LLC*, No. 4:11cv470-RH/WCS, at 5–6; *see also Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Southwestern Ry. Co.*, 257 U.S. 547, 557 (1992) (describing the essential characteristics of a judicial controversy).

Second, equity favors that the case be remanded to the Alabama PSC pursuant to § 1452(b). Given the expertise of the Alabama PSC in adjudicating ICA disagreements, the minimal effect of remand on the administration of Defendant's bankruptcy estate, and the FCC's recent ruling against the practices engaged in by

Defendant, equity favors that the case be remanded. *See BellSouth Telecomms., LLC*, No. 4:11cv470-RH/WCS, at 8–10; *see also BellSouth Telecomms., LLC, v. Halo Wireless, Inc.*, No. 3:11-0795, at 5–6 (M.D. Tenn. Nov. 1 2011) (holding that the case should be remanded for a determination by the state commission, otherwise, "a state commission's authority to approve or reject an [ICA] would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved (quoting *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 343 (3d Cir. 2007)). Furthermore, Defendant may challenge any order of the Alabama PSC in federal court. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277–79 (11th Cir. 2003).

Finally, Defendant is protected from exposure to monetary damages by order of the Bankruptcy Court. That leaves largely regulatory issues at play in the Alabama PSC proceeding, including whether Defendant's actions under the ICA violated applicable regulations and agency rulings. Those issues should be resolved in the state utility commission forum.

Accordingly it is ORDERED that Plaintiff's Motion to Remand (Doc. # 10) is GRANTED, and that this case is REMANDED to the Alabama Public Service Commission, pursuant to § 1442(b). The Clerk of the Court is DIRECTED to take appropriate steps to effectuate the remand.

DONE this 26th day of January, 2012.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov
Effective on April 9, 2006, the new fee to file an appeal will increase from $255.00 to $455.00.

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C.§ 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1 365, 1 368 (11th Ci r. 1 983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(c).

   (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). Williams v. Bishop, 732 F.2d 885, 885- 86 (11th Cir. 1984). A judg ment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S.196, 201, 108 S.Ct. 1717, 1721-22, 100 L .Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions . . ." and from "[i]nterlocutory decrees . . . determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5**: The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing**: The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE AND ATLANTA DIVISIONS

HALO WIRELESS, INC., Plaintiff, v. TDS TELECOMMUNICATIONS CORPORATION, *et. al* Defendants.	:	CIVIL ACTION NO. 2:11-CV-158-RWS
TDS TELECOMMUNICATIONS CORPORATION, *et. al*, Plaintiffs, v. HALO WIRELESS, INC., *et. al* Defendants.	:	CIVIL ACTION NO. 1:11-CV-2749-RWS

ORDER

This case comes before the Court on TDS Telecommunications Corporation, Blue Ridge Telephone Company, Camden Telephone & Telegraph Company, Inc., Nelson-Ball Ground Telephone Company, and Quincy Telephone Company (collectively, "TDS")'s Motions to Consolidate [36, 14],

TDS's Motion for Reconsideration of Order Staying Case and to Remand [11], TDS's Motion for Oral Argument on its Motion for Reconsideration and to Remand [36], and Halo Wireless, Inc. ("Halo") and Transcom Enhanced Services, Inc. ("Transcom")'s Motions to Transfer to the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division [34, 17]. After a review of the records, the Court enters the following order.

I. Relevant Factual Summary

On June 14, 2011, TDS filed a complaint with the Georgia Public Service Commission ("Georgia PSC") against Halo and its affiliate Transcom–an action similar to over twenty other actions filed in ten different states. This complaint requested: 1) that the Georgia PSC declare that wireless traffic sent to the TDS by Halo for termination was subject to intrastate access-charges; 2) that the Georgia PSC issue a cease and desist order which would prevent Halo and Transcom from providing a telecommunications service and/or a telephone system without a Georgia Certificate of Authority or Georgia Certificate of Public Convenience and Necessity; and 3) that Halo and Transcom pay all outstanding intrastate access-charges and interest accrued to TDS. Atl. Cmpl., Dkt. No. [3-1].

On June 28, 2011, Halo and Transcom filed the Gainesville action, asking this Court to declare that the FCC retained exclusive jurisdiction over the issues in the Georgia PSC matter and to enjoin TDS from pursuing such claims in any non-FCC tribunal. Gains. Cmpl., Dkt. No. [1]. TDS then moved to dismiss the Gainesville action, and Halo filed a separate suit in the Superior Court of Fulton County, Georgia, seeking to enjoin the Georgia PSC from pursuing any action in that suit.

On August 8, 2011, the day before the Georgia PSC was scheduled to conduct a hearing in the administrative matter and the day of its Superior Court hearing, Halo filed for Chapter 11 bankruptcy in the Eastern District of Texas. Subsequently, the Georgia PSC decided that because only Halo was a debtor, and not Transcom, the bankruptcy automatic stay only applied to Halo and not Transcom. As a result of that determination, Halo and Transcom filed a Notice of Removal in the Georgia PSC action and removed that matter to the Northern District of Georgia, Atlanta Division. After a determination that that suit involved the same parties and issues as the Gainesville action, the Honorable Amy Totenberg transferred the Atlanta case to the undersigned for

consolidation after first staying that matter, *sua sponte,* pursuant to Halo's suggestion of bankruptcy on the docket.

On September 13, 2011, TDS filed a motion for relief from stay in the Bankruptcy Court for the Eastern District of Texas pursuant to 11 U.S.C. § 362(b)(4), which states that a Chapter 11 automatic stay will not apply to proceedings which enforce a "governmental unit's police or regulatory power." On October 26, 2011, Bankruptcy Judge Brenda T. Rhodes granted TDS's motion and lifted Halo's automatic stay in any state-regulatory proceeding, allowing the Georgia PSC to determine if it has jurisdiction over the issues raised in the TDS complaint and to determine whether Halo has violated Georgia state law. Judge Rhodes stated, though, that while those commissions could issue relief to TDS, TDS could not collect on any liquidated debt incurred therein without the expressed permission of the bankruptcy court. See Dkt. No. [36-2].

On October 28, 2011, Halo moved the bankruptcy court to issue a stay pending appeal, and on November 1, 2011, Judge Rhodes denied that request. She stated that "the harms alleged by the debtor – *i.e.*, the cost of proceeding before the state utility commissions and the potential for differing results

amongst the commissions – are 'part and parcel of corporate federalism.'" Dkt. No. [36-3] (citing Budget Prepay, Inc. v. AT&T Corp., 605 F.3d 272, 281 (5th Cir. 2010)). Judge Rhodes did note that there was "a risk that this Court's decision could be reversed," though, and she granted Halo's request for a direct appeal to the Fifth Circuit on the matter. Id.

TDS has moved to consolidate the Gainesville and Atlanta actions, and Halo has requested instead that they be transferred to the bankruptcy court so that one federal venue may hear all of these claims which have been brought by TDS around the country. As well, TDS asks this Court to lift the stay and remand the action to the Georgia PSC. The Court will consider each motion in turn.

II. Motion to Consolidate

Pursuant to Federal Rule of Civil Procedure 42(a), TDS seeks consolidation of two cases pending in this district. Rule 42 provides:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trail any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid necessary cost or delay.

This Rule "codifies a district court's inherent managerial power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Young v. City of Augusta, 59 F.3d 1160, 1168 (11th Cir. 1995) (internal quotations omitted). Although the decision to consolidate cases is committed to the sound discretion of the trial court, id. (Rule 42(a) "is permissive and vests a purely discretionary power in the district court.") (quotations omitted); Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985) ("A district court's decision under Rule 42(a) is purely discretionary."), that discretion is not without limits. As the text of Rule 42(a) makes clear, a trial court may consolidate cases only when (1) the actions involve a common question of law or fact and (2) they are pending before the same court. FED. R. CIV. P. 42(a); see Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 765 (11th Cir. 1995); In re Consol. Parlodel Lit., 182 F.R.D. 441, 444 (D.N.J. 1998) ("A common question of law or fact shared by all of the cases is a prerequisite for consolidation.").

Where the common question of law or fact requirement has been satisfied, trial courts in the Eleventh Circuit are "encouraged . . . to 'make good use of Rule 42(a) . . . in order to expedite the trial and eliminate unnecessary

repetition and confusion.' " Hendrix, 776 F.2d at 1495 (quoting Dupont v. S. Pac. Co., 366 F.2d 193, 195 (5th Cir. 1966)). But, "the mere existence of common issues, although a prerequisite to consolidation, does not mandate a joint trial." Cedar-Sinai Med. Ctr. v. Revlon, Inc., 111 F.R.D. 24, 32 (D. Del. 1986). Rather, in determining whether consolidation is appropriate, the court must assess

> whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Hendrix, 776 F.2d at 1495 (quoting Arnold v. E. Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982)). Thus, even though "consolidation may enhance judicial efficiency, '[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial.'" In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993) (quoting Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)). The party seeking consolidation bears the burden of establishing that consolidation under Rule 42(a) is appropriate. In re Repetitive Stress Injury Litig., 11 F.3d at 373; Servants of Paraclete, Inc. v.

Great Am. Ins. Co., 866 F. Supp. 1560, 1572 (D.N.M. 1994); Powell v. Nat. Football League, 764 F. Supp. 1351, 1359 (D. Minn. 1991).

The Court finds that consolidation of these two suits is appropriate. A central question in both suits is whether the issues raised before the Georgia PSC are within the exclusive jurisdiction of the FCC; i.e., whether the claims can be heard at the Georgia PSC at all. In fact, the only distinction between these actions is that the Gainesville action brings that question in the form of a declaratory judgment, while the Atlanta action brings the question as a defense to jurisdiction. Ultimately, the consolidation of these actions would save the parties from possible inconsistent judgments and would save both the parties' and the court's resources. Therefore, TDS's Motions for Consolidation [36, 14] are **GRANTED**. The Court **DIRECTS** the Clerk to **CONSOLIDATE** these actions under Civil Action No. 1:11-CV-2749-RWS, as the parties are more appropriately aligned under that action, and to **ADMINISTRATIVELY CLOSE** Civil Action No. 2:11-CV-606-RWS.

III. Motion for Reconsideration of the Motion to Stay and Motion to Remand[1]

[1]As the Court finds the briefing sufficient in this matter, TDS's Motion for Oral Argument on its Motion for Reconsideration and to Remand [36] is **DENIED**.

As an initial matter, TDS moves this Court to reconsider its decision to stay this action. The Court notes that the bankruptcy court has determined that the automatic stay provision should not apply to any state-regulatory actions, and this Court only *sua sponte* issued the stay in response to Halo's suggestion of bankruptcy on the docket. As this court agrees with the bankruptcy court's reasoning that the automatic stay should not apply, the Court will reconsider its prior order [9] and will **TERMINATE** the stay.

Additionally, TDS has requested this Court to remand this action back to the Georgia PSC. Halo removed this action pursuant to 28 U.S.C. § 1452, which provides:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under Section 1334 of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.

Further, § 1334(b) provides that the district court "shall have original but not

exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

TDS argues that removing the action from the Georgia PSC was improper as it is not a "civil action" which would be covered by § 1452, but rather is a regulatory proceeding. Halo counters that because, at bottom, the suit seeks monetary damages, it is a civil action between private parties. Moreover, Halo argues that the FCC retains exclusive jurisdiction over this matter, while asking this Court to transfer it to the bankruptcy court.

Like the Middle District of Tennessee, the Bankruptcy Court of South Carolina, and the Western District of Missouri before it, this Court also holds that the Georgia PSC action was not removable. See BPS Tel. Co. v. Halo Wireless, Inc., 2:11-cv-4220-NKL, Dkt. No. [41-1] (W.D. Mo. Dec. 21, 2011); Concord Tel. Exch. v. Halo Wireless, Inc., No. 3-11-0796, 2011 WL 5325572 (M.D. Tenn. Nov. 3, 2011); Bellsouth Telecomms., LLC v. Halo Wireless, Inc., No. 11-80162-dd, 2011 WL 6010248 (Bankr. D.S.C. Nov. 30, 2011). Here, TDS has requested the Georgia PSC to issue cease and desist orders which would prevent Halo and Transcom from acting in Georgia–a clear assertion of

the State's regulatory power. See O.C.G.A. § 46-5-45.[2] Further, TDS is arguing that Halo and Transcom's improper traffic is essentially intrastate, and the Georgia PSC is expressly given jurisdiction to regulate telephone companies within Georgia. See O.C.G.A. § 46-2-20 *et seq.*

Moreover, because Halo removed this action prior to the Georgia PSC issuing an opinion, there is no decision or interpretation for this Court to review. See Concord Tel. Exch., 2011 WL 5325572 at *2 ("Federal district courts have jurisdiction to review certain types of decisions by state commissions, and the Telecommunications Act of 1996 . . . provides for judicial review of certain types of determinations by state commissions."); 47 U.S.C. § 252(e)(6). As a result, the Court **GRANTS** TDS's Motion to Remand [11].[3] The

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[2]O.C.G.A. § 46-5-45 states "[w]henever any person is engaged in or is about to engage in the construction, operation, or acquisition of any telephone line, plant, or system without having secured a certificate of public convenience and necessity as required by Code Section 46-5-41, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the person complained of to cease and desist from such construction, operation, or acquisition until the commission makes and files its decision on the complaint or until the further order of the commission. The commission may, after a hearing conducted after the giving of reasonable notice, make such order and prescribe such terms and conditions with respect thereto as are just and reasonable."

[3]The Court notes that had it not consolidated the Gainesville and Atlanta actions, there might be a question as to whether the declaratory-judgment Gainesville action could remain, which the Court no longer has to address post-consolidation. However, in consideration of Younger v. Harris, 401 U.S. 37 (1971) and its progeny, this Court has

Clerk is **DIRECTED** to remand this action to the Georgia PSC, Dkt. No. 34219. As a result, Halo and Transcom's Motions to Transfer [34, 17] are **DENIED**.

IV. Conclusion

As an initial matter, TDS's Motion for Oral Argument on its Motion for Reconsideration and to Remand [36] is **DENIED**. However, TDS's Motions for Consolidation [36, 14] are **GRANTED**. The Court **DIRECTS** the Clerk to **CONSOLIDATE** these actions under Civil Action No. 1:11-CV-2749-RWS, as the parties are more appropriately aligned under that action, and to **ADMINISTRATIVELY CLOSE** Civil Action No. 2:11-CV-158-RWS. Additionally, the Court will **RECONSIDER** its prior order staying the matter [9] and will **TERMINATE** the stay. Further, the Court **GRANTS** TDS's Motion to Remand [11]. The Clerk is **DIRECTED** to remand this action to the Georgia PSC, Dkt. No. 34219. As a result, Halo and Transcom's Motions to Transfer to the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division [34, 17] are **DENIED**.

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grave reservations about whether Halo's declaratory judgment action would have been proper in the first instance. But as it does not have to reach such issues, the Court declines to do so here.

SO ORDERED, this 26th day of January, 2012.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

EXHIBIT J

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, LLC dba AT&T TENNESSEE	)	**DOCKET NO. 11-00119**
	)	
v.	)	
	)	
HALO WIRELESS, INC.	)	

ORDER DENYING MOTION TO DISMISS

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or "Authority") at a Scheduling Conference held on December 12, 2011 on the Motion to Dismiss filed by respondent Halo Wireless, Inc. ("Halo"). This matter is on remand to the TRA from the United States District Court for the Middle District of Tennessee. For the reasons stated below, the Motion is DENIED and this matter is set for further proceedings before the Authority as stated in the attached scheduling order.

Travel of the Case

On July 26, 2011, BellSouth Telecommunications, LLC dba AT&T Tennessee ("AT&T") filed a complaint in the TRA against Halo, requesting that the TRA issue an order "allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA."[1] The complaint also states that AT&T "seeks an Order

[1] *Complaint*, p. 1 (July 26, 2011). This matter has considerable overlap with Docket No. 11-00108, which was filed by a number of rural local exchange carriers against Halo alleging improper conduct. Both dockets were removed to federal court and remanded, and in both the bankruptcy court's lifting of the automatic stay has returned the complaint to the TRA for adjudication. Certain documents that are relevant to this case are not contained in the docket file for it, but are contained in the file for Docket No. 11-00108. In this Order, the Hearing Officer takes

requiring Halo to pay AT&T Tennessee the amounts Halo owes" as a result of "an access charge avoidance scheme."[2] On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)."[3] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against [Halo] in the instant proceeding."[4]

On August 19, 2011, counsel for Halo filed a notice of removal to federal court, which references a separate notice of removal and states that this matter has been removed "to the United States District Court for the Middle District of Tennessee, Nashville Division . . . pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[5] Thus, this case was removed to the District Court because of the bankruptcy proceeding. On November 10, 2011, the AT&T filed a letter informing the TRA that it may now hear this matter, the District Court having remanded it to the TRA and the Bankruptcy Court having lifted the automatic stay on a limited basis. AT&T requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for the purpose of convening a contested case and proceeding with the appointment of a hearing officer."[6] On November 17, 2011, Halo filed a Motion to Abate, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit. On December 1, 2011, Halo filed a partial motion to dismiss the complaint, and AT&T filed its response to Halo's motion on December 8, 2011.

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administrative notice of the file in Docket No. 11-00108 and incorporates the Order in that case denying the Respondents' motions to dismiss, which is being filed contemporaneously herewith, as necessary by reference.

[2] *Id.*

[3] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).

[4] *Id.* at 2.

[5] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

[6] Letter from Joelle Phillips to Chairman Kenneth C. Hill (November 10, 2011).

Consideration of This Matter During the November 21, 2011 Authority Conference

This matter came before the Authority at the regularly scheduled Authority Conference held on November 21, 2011. At that time, the Authority voted unanimously to deny the motion to abate and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.

November 21, 2011 Scheduling Conference and December 12, 2011 Status Conference

Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter. This matter was reconvened before the Hearing Officer pursuant to notice on December 12, 2011, at which time the parties were heard on the pending motion. The parties were represented on both occasions as follows:

> **For BellSouth Telecommunications, LLC dba AT&T Tennessee – Joelle Phillips, Esq.**, 333 Commerce Street, Suite 2101, Nashville TN 37201.
>
> **For Halo Wireless, Inc. – Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.,** McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201 and **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Higway, Bldg. 2-235, West Lake Hills, TX 78746.

The District Court's Memorandum

In its November 1, 2011 Memorandum, the District Court stated:

> Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant Halo Wireless) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4), so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. . . . The Bankruptcy Court held that the automatic stay does apply to prevent parties from bringing or continuing actions for money judgments or efforts to liquidate the amount of the complainants' claims.[7]

The District Court further stated:

[7] *BellSouth Telecommunications, Inc. v. Halo Wireless, Inc,* Case No. 3-11-0795, M.D. Tenn., *Memorandum*, p. 2 (November 1, 2011).

> Plaintiff argues that a claim for interpretation or enforcement of an ICA must be brought in the first instance in the state commission that approved the ICA in question. . . . Plaintiff argues that the jurisdiction of this Court is limited to determining rights under ICAs after final ruling from the state commission. . . . Defendant, on the other hand, contends that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action" and that the TRA does not have jurisdiction because the claims implicate federal questions. . . . Defendant also asserts that the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction.[8]

The District Court noted that although "[f]ederal district courts have jurisdiction to review certain types of decisions by state commissions," including decisions under the 1996 Telecommunications Act, "[h]ere, . . . there is no state commission determination to review."[9] The District Court's examination of the relevant federal law is instructive—and directly contrary to Halo's assumptions regarding jurisdiction—and is quoted here at length because of its relevance to this decision:

> The Telecommunications Act of 1996 ("the Act") requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm'n of Texas*, 361 F.Supp.2d 634, 636 (W.D. Tex. 2005). Federal district courts have jurisdiction to review interpretation and enforcement decisions of the state commissions. *Id.; Southwestern Bell* at p. 480, 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.
>
> In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331. *Id. At 778; see also Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003)(federal courts have jurisdiction under Section 1331 to hear challenges to state commission order interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003)(federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

[8] *Id.* at 3-4.
[9] *Id.* at 4.

Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland*, ICAs are federally mandated agreements and to the extent the ICA imposes a duty consistent with the Act, that duty is a federal requirement. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).

The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action. Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what for a parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).

The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core,* a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell,* 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).

On the other hand, in *Central Telephone,* the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone,* 759 F.Supp.2d at 778 and 786.

The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a "determination" by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell,* 540 F.Supp.2d at 919. As the *Core* court stated: "a state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved." *Core,* 493 F.3d at 343 (citing *BellSouth Telecommunications,* 317 F.3d at 1278, n.9).[10]

On this basis, the District Court remanded the complaint to the TRA, noting that "[t]he Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt to obtain and/or enforce a money judgment."[11]

The Bankruptcy Court's Order

In an Order issued on October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11

[10] *Id.* at 4-6.
[11] *Id.* at 6-7.

U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending State Commission Proceedings," including proceedings brought by AT&T.[12] The Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such matters may be rendered; provided however, that nothing herein shall permit, as part of such proceedings:
> A. liquidation of the amount of any claim against the Debtor; or
> B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor.[13]

AT&T's Claims

AT&T is an incumbent local exchange carrier ("ILEC") operating in Tennessee. As explained in its Complaint, AT&T seeks TRA adjudication of a dispute over alleged breach of an interconnection agreement between AT&T and Halo:

> AT&T Tennessee seeks an order allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA. The ICA does not authorize Halo to send AT&T traffic that does not originate on a wireless network, but Halo, in the furtherance of an access charge avoidance scheme, is sending large volumes of traffic to AT&T Tennessee that does not originate on a wireless network, in violation of the ICA.
>
> As a result of this and other unlawful Halo practices, Halo owes AT&T Tennessee significant amounts of money – amounts that grow rapidly each month and that Halo refuses to pay. AT&T Tennessee brings this Complaint in order to terminate the ICA and discontinue its provision of interconnection and traffic transit and termination service to Halo. AT&T Tennessee also seeks an Order requiring Halo to pay AT&T Tennessee for the amounts Halo owes.[14]

AT&T explains the ICA as follows:

> The parties' ICA authorizes Halo to send only wireless-originated traffic to AT&T Tennessee. For example, a recital that the parties added through an amendment to the ICA when Halo adopted the ICA, states:
>
> > Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2)

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[12] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay*, p. 1 (October 26, 2011). The Bankruptcy Court's Order is attached hereto.

[13] *Id.* at 2.

[14] *Complaint*, p. 1 (July 26, 2011).

> traffic that ***originates through wireless transmitting and receiving facilities*** before [Halo] delivers traffic to AT&T for termination by AT&T or for transit to another network. (Emphasis added).
>
> Despite that requirement, Halo sends traffic to AT&T Tennessee that is not wireless-originated traffic, but rather is wireline-originated interstate, interLATA or intraLATA toll traffic. The purpose and effect of this breach of the parties' ICA is to avoid payment of the access charges that by law apply to the wireline-originated traffic that Halo is delivering to AT&T Tennessee by disguising the traffic as "Local" wireless-originated traffic that is not subject to access charges. By sending wireline-originated traffic to AT&T Tennessee, Halo is materially violating the parties' ICA.[15]

AT&T further alleges that Halo is altering or deleting call detail:

> The ICA requires Halo to send AT&T Tennessee proper call information to allow AT&T Tennessee to bill Halo for the termination of Halo's traffic. Specifically, Section XIV.G of the ICA provides:
>
> > The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.
>
> AT&T Tennessee's analysis of call detail information delivered by Halo, however, shows that Halo is consistently altering the Charge Party Number ("CN") on traffic it sends to AT&T Tennessee. This prevents AT&T Tennessee (and likely other, downstream, carriers) from being able to properly bill Halo based on where the traffic originated. That is, Halo's conduct prevents AT&T Tennessee (and likely other, downstream, carriers) from determining where the call originated (and thus whether it is interLATA or intraLATA or interMTA or intraMTA), and thus prevents AT&T Tennessee from using the CN to properly bill Halo for the termination of Halo's traffic.
>
> Halo's alteration of the CN on traffic it sends to AT&T Tennessee materially breaches the ICA. AT&T Tennessee respectfully requests that the Authority authorize AT&T Tennessee to terminate the ICA for this breach and to discontinue its provision of traffic transit and termination service to Halo, and grant all other necessary relief.[16]

These allegations are covered in Counts I through III of AT&T's Complaint, which conclude with a request that Halo be ordered to pay amounts owed under the ICA. In Count IV, AT&T alleges that "[p]ursuant to the ICA, Halo has ordered, and AT&T Tennessee has provided, transport facilities associated with interconnection with AT&T Tennessee."[17] AT&T further

[15] *Id.* at 3.
[16] *Id.* at 4-5.
[17] *Id.* at 6.

states that it "has billed Halo for this transport on a monthly basis pursuant to the ICA. Halo, however, has refused, with no lawful justification or excuse, to pay those bills."[18] Based on these allegations, AT&T "requests that the Authority declare that Halo must pay for the facilities it order from AT&T Tennessee."[19]

Halo's Motion to Dismiss

Halo has moved to dismiss Counts I, II, and III of the Complaint. In its Motion to Dismiss, Halo states:

> Halo is a commercial mobile radio service ("CMRS") provider. Halo has a valid and subsisting Radio Station Authorization ("RSA") from the Federal Communications Commission ("FCC") authorizing Halo to provide wireless service as a common carrier. AT&T has filed a complaint that it claims to be a post-ICA dispute. While the parties do have an ICA in Tennessee, Halo contends that AT&T's Counts I,II and III do not really seek and interpretation or enforcement of those terms. As explained further below, AT&T is impermissibly and improperly seeking to have the TRA decide whether Halo is acting within and consistent with its federal license. The TRA, however, lacks the jurisdiction and capacity to take up that topic.[20]

Halo further states:

> In addition, Halo sells CMRS-based telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom"), Halo's high volume customer. As explained further below, AT&T's Counts I, II and III do not actually seek an interpretation or enforcement of the ICA terms. Instead, AT&T is impermissibly and improperly seeking to have the TRA decide whether Transcom is "really" an Enhanced/Information Service Provider, because if Transcom is an end user then there can be no dispute that the traffic in issue does "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The TRA, however, lacks the jurisdiction and capacity to take up the issue of whether Transcom is "really" an ESP because (1) AT&T is precluded as a matter of law from disputing Transcom's ESP status and (2) the issue is governed by federal law and only the FCC or a federal court may resolve it.

Halo offers the following in support of its claim that the TRA cannot exert jurisdiction over the complaint:

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[18] *Id.*
[19] *Id.*
[20] *Halo Wireless Inc.'s Partial Motion to Dismiss and Answer to the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee*, p. 1 (December 1, 2011).

> On four separate occasions, courts of competent jurisdiction have ruled that Transcom is an Enhanced Service Provider ("ESP") *even for phone-to-phone calls* because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities (the "ESP rulings"). Copies of the ESP rulings have been attached to this submission as **Exhibits A-D.** The court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user.[21]

And Halo offers the following to argue that because it is providing service to a purported ESP, it is not in violation of its interconnection agreement with AT&T:

> Halo is selling CMRS-based telephone exchange service to an ESP End User. All of the communications at issue originate from end user wireless customer premises equipment ("CPE") (as defined in the Act, 47 U.S.C. § 153(14)) that is located in the same MTA as the terminating location. The bottom line is that not one minute of the relevant traffic is subject to access charges. It is all "reciprocal compensation" traffic and subject to the "local" charges in the ICA. Further, and equally important, the ICA uses a factoring approach that allocates as between "local" and "non-local." Halo has paid AT&T for termination applying the contract rate and using the contract factor, AT&T cannot complain.[22]

Halo states that AT&T "wants the TRA and other commissions across the country to rule that Halo's service is 'not wireless' and 'not CMRS.'"[23] However, Halo argues, only the Federal Communications Commission ("FCC") has jurisdiction to make such determinations:

> The courts have agreed that state commissions cannot attempt to impose rate or entry regulation on wireless providers, and in particular, state commissions cannot issue "cease and desist" orders on wireless providers. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service Comm.*, 648 F.2d 1350 (5th Cir. 1981). Further, Halo has a *federally*-granted right to interconnect and the FCC has asserted "plenary" jurisdiction over CMRS interconnection and expressly pre-empted any state authority to deny interconnection. Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, ¶¶12, 17, 2 FCC Rcd 2910, 2911-2912 (FCC 1987)("*RCC Interconnection Order*").
>
> . . .

[21] *Id.* at 2.
[22] *Id.* at 3.
[23] *Id.*

> The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because "a multitude of interpretations of the same certificate" will result. *See Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959). The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* At 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989). If a state commission or AT&T believes that the federally-licensed entity is engaging in some "scheme" or "subterfuge" through its practices, the proper forum is the FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief. *Service Storage*, 359 U.S. at 179. A state commission cannot take any action that would "amount to a suspension or revocation" of a federal license. *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).[24]

Halo also disputes the factual bases alleged in the Complaint:

> Contrary to AT&T's assertion in paragraph 7 of the Complaint, the traffic in issue *does* "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The network arrangement in every state and every MTA is the same. Halo has established a 3650 MHz base station in each MTA. Halo's customer has 3650 MHz wireless stations – which constitute CPE as defined in the Act – that are sufficiently proximate to the base station to establish a wireless link with the base station. When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various interconnection agreements ("ICAs").
>
> AT&T is apparently claiming that Halo is merely "re-originating" traffic and that the "true" end points are elsewhere on the PSTN. In making this argument, however, AT&T is advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a "further communication" that will then "continue to the ultimate destination" elsewhere. The Court held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an "origination" and "termination" endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the "end-to-end" test).
>
> The traffic here goes to Transcom where there is a "termination." Transcom then "originates" a "further communication" in the MTA. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges

[24] *Id.* at 5-7.

(because it is not "carved out by § 251(g) and is covered by § 251(b)(5), the call *to* the PSTN is also immune.[25]

AT&T's Response

In response to the Motion to Dismiss, AT&T states that "AT&T Tennessee has come to the TRA because, as the evidence will show, Halo is engaged in conduct that Halo's ICA with AT&T Tennessee prohibits."[26] AT&T further states:

> The evidence will show that Halo's ICA prohibits Halo from delivering traffic that originates on wireline telephones, which makes sense given Halo's self-proclaimed status as a wireless carrier. Halo, however, has delivered large volumes of wireline-originated traffic to AT&T Tennessee, and it has attempted to disguise this traffic as wireless-originated traffic (by altering or withholding call-detail information). Halo's incentive for doing so is obvious – the charges for terminating the type of wireline-originated traffic that Halo actually sent are higher than the charges for terminating the wireless-originated traffic addressed by Halo's ICA. Halo's conduct, however, is prohibited by the ICA, and AT&T Tennessee is entitled to hold Halo in breach of the ICA.[27]

In response to Halo's argument based on the *Service Storage* case, AT&T states:

> Halo claims that AT&T Tennessee's complaint asks the TRA to construe licenses that only the FCC can construe. AT&T Tennessee's complaint does not ask the TRA to do any such thing. AT&T Tennessee's claims in no way depend upon the TRA finding or even considering whether Halo's actions violated its wireless licenses. Nothing in AT&T's complaint references Halo's FCC licenses, nor are those licenses in any way relevant to determining whether Halo breached its ICA (which was submitted to and approved by the Authority, not the FCC) by disguising wireline-originated traffic as wireless traffic. Thus, Halo's jurisdictional arguments rest on an inaccurate premise and are meritless.[28]

AT&T concludes:

> While AT&T Tennessee disagrees (and will present substantial evidence to prove its allegations), the dispute about whether the traffic is, or is not, wireline originated is a factual dispute. Factual disputes or factual denials are not a basis to dismiss a complaint. In fact, the existence of a factual dispute is precisely the reason that an evidentiary hearing is needed.[29]

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[25] *Id.* at 7-8.
[26] *AT&T Tennessee's Response to Halo's Partial Motion to Dismiss and Answer to Complaint*, pp. 1-2 (December 8, 2011).
[27] *Id.* at 1-2.
[28] *Id.* at 3.
[29] *Id.*

Discussion

"The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint."[30] "[W]hen a complaint is tested by a Tenn.R.Civ.P. 12.02(6) motion to dismiss, [the tribunal] must take all the well-pleaded, material factual allegations as true, and [it] must construe the complaint liberally in the plaintiff's favor."[31] Taking "all the well-pleaded, material factual allegations" in the complaint "as true," the complaint raises claims that are squarely within the TRA's jurisdiction. The complaint seeks interpretation of an interconnection agreement that was approved by the TRA in Docket No. 10-00063 pursuant to 47 U.S.C. 252 and is subject to enforcement by the TRA.[32] Halo's protestations to the contrary are in complete conflict with the TRA's duties and authority under relevant law, as explained in detail in the District Court's November 1, 2011 Memorandum, and must be dismissed.[33] AT&T is entitled, if it can, to present evidence showing that the interconnection agreement between Halo and AT&T is being breached.

Halo also raises in this case an attempt to create an additional jurisdictional threshold based on the 1959 decision of the United States Supreme Court in *Service Storage & Transfer Co. v. Commonwealth of Virginia*[34] a case in which the Court considered a conflict between the Virginia State Corporation Commission's attempted exercise of jurisdiction over the intrastate truck traffic of a motor carrier and the fact that the carrier involved had been granted an interstate license by the Interstate Commerce Commission ("ICC"). For the reasons stated in the Hearing Officer's Order dismissing the motions to dismiss filed by Halo and its co-defendant in Docket

[30] *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).
[31] *Id.*
[32] "The agreement [between Halo and AT&T] and amendment thereto are reviewable by the Authority pursuant to 47 U.S.C. § 252 and Tenn. Code Ann. §§ 65-4-104 (2004) and 65-4-124(a) and (b) (2004), or in the alternative, under Tenn. Code Ann. § 65-5-109(m) (2009)." *See In re: Petition for Approval of the Interconnection Agreement and Amendment Thereto between BellSouth d/b/a AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063, *Order Approving the Interconnection Agreement and Amendment Thereto*, p. 2 (June 21, 2010).
[33] The District Court's Memorandum clearly reflects the fact that the District Court believes that the only posture in which this matter could come before it is *on appeal*, not by removal.
[34] *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959).

No. 00-00108, which is being issued contemporaneously herewith and which is incorporated herein by reference, Halo's reliance on *Service Storage* is without merit, and this case can go forward at the TRA under the limitations set by the Bankruptcy Court.

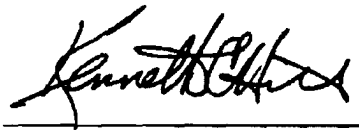
Accordingly, the Hearing Officer denies the Motion to Dismiss filed by Halo and sets this action for further proceedings in accordance with the attached procedural schedule.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed by Halo Wireless, Inc. Services, Inc. is denied.

2. This matter shall proceed in accordance with the procedural schedule that is being issued simultaneously herewith.

IT IS SO ORDERED.



Kenneth C. Hill, Hearing Officer

EOD
10/26/2011

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	Chapter 11
	§	
Halo Wireless, Inc.,	§	Case No. 11-42464-btr-11
	§	
Debtor.	§	
	§	

ORDER GRANTING MOTION OF THE AT&T COMPANIES TO DETERMINE AUTOMATIC STAY INAPPLICABLE AND FOR RELIEF FROM THE AUTOMATIC STAY [DKT. NO. 13]

Upon consideration of the *Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay* [Dkt. No. 13] (the "AT&T Motion")[1], and it appearing that proper notice of the AT&T Motion has been given to all necessary parties; and the Court, having considered the evidence and argument of counsel at the hearing on the AT&T Motion (the "Hearing"), and having made findings of fact and conclusions of law on the record of the Hearing which are incorporated herein for all purposes; it is therefore:

ORDERED that the AT&T Motion is GRANTED, but only as set forth hereinafter; and it is further

ORDERED that, pursuant to 11 U.S.C. §362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 (the "Automatic Stay") is not applicable to currently pending State Commission Proceedings[2], except as otherwise set forth herein; and it is further

ORDERED that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion

[1] The Court contemporaneously is entering separate orders granting *The Texas and Missouri Companies' Motion to Determine Automatic Stay Inapplicable and in the Alternative, for Relief From Same* [Dkt. No. 31] and the *Motion to Determine the Automatic Stay is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement* [Dkt. No. 44] filed by TDS Telecommunications Corporation.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:

A. liquidation of the amount of any claim against the Debtor; or

B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the "Reserved Matters"); and it is further

ORDERED that nothing in this Order precludes the AT&T Companies[3] from seeking relief from the Automatic Stay in this Court to pursue the Reserved Matters once a state commission has (i) first determined that it has jurisdiction over the issues raised in the State Commission Proceeding; and (ii) then determined that the Debtor has violated applicable law over which the particular state commission has jurisdiction; and it is further

ORDERED that the AT&T Companies, as well as the Debtor, may appear and be heard, as may be required by a state commission in order to address the issues presented in the State Commission Proceedings; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation and/or interpretation of this Order.

Signed on 10/26/2011

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

[3] The AT&T Companies include Southwestern Bell Telephone Company d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; BellSouth Telecommunications, LLC d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee; Illinois Bell Telephone Company d/b/a AT&T Illinois; Indiana Bell Telephone Company Inc. d/b/a AT&T Indiana; Michigan Bell Telephone Company d/b/a AT&T Michigan; The Ohio Bell Telephone Company d/b/a AT&T Ohio; Wisconsin Bell Telephone, Inc. d/b/a AT&T Wisconsin; Pacific Bell Telephone Company d/b/a AT&T California; and Nevada Bell Telephone Company d/b/a AT&T Nevada.